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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 165

DEAUVILLE ASSOCIATES, INC.,

Petitioner,

vs.

JOHN M. MURRELL AND D. H. REDFEARN, AS RECEIVERS OF DEAUVILLE CORPORATION,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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To the Honorable, the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in the above entitled case.

Opinions Below

The opinion of the Court of Appeals (R. 133) is reported in 180 F. 2d 275. The District Court entered judgment without rendering an opinion (R. 81, 82).

Jurisdiction

The Court of Appeals for the Fifth Circuit filed its opinion on February 27, 1950 (R. 133). A petition for rehearing, filed March 20, 1950 (R. 139), was denied on April 5, 1950 (R. 151). The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

Questions Presented

1. Where the circuit court of appeals reversed the district court for erroneously denying leave to intervene on an application filed pursuant to Rule 24(a) of the Federal Rules of Civil Procedure, setting forth that the representation of applicant's interest is inadequate and that applicant is or may be bound by a judgment in the action, is the intervenor disabled from contesting decrees entered by the district court on the merits subsequent to erroneous denial of leave to intervene and prior to the date of the reversal of that error by the appellate court; and may the intervenor thus be denied any day in court with respect to such decrees?

2. Whether there is a requisite showing of separable controversy against citizens of different states sufficient to support removal of this case to the district court.[1]

Rule Involved

Rule 24 of the Federal Rules of Civil Procedure is set forth in the Appendix.

Statement

This litigation was begun by a complaint filed by Lucy Eristavi-Tchitcherine in a Florida state court against J. A.

[1] This question would probably not of itself warrant certiorari. If certiorari is granted, petitioner will present the question as one of Federal jurisdiction which the Court could consider upon its own motion.

Lasser, B. A. Winkel, and others. The suit was removed to the District Court for the Southern District of Florida, and there numbered No. 1148, or No. 1148-M-Civil.

Petitioner, Deauville Associates, Inc., has sought to intervene in this proceeding as the successor in interest of original defendants and cross-claimants J. A. Lasser and B. A. Winkel.

The circuit court of appeals referred to the previous opinions and records for the earlier phases of the litigation (see *Aspen Min. & Smelting Co.* v. *Billings,* 150 U. S. 131). Its principal previous opinions are: (a) its opinion in No. 11978, filed November 7, 1947, reversing a judgment on the pleadings in favor of cross-claimants Lasser and Winkel, and remanding for trial, *Eristavi-Tchitcherine* et al. v. *Lasser* et al., 164 F. 2d 144; reprinted for convenience in the Appendix; and (b) its opinion in No. 12436, filed April 4, 1949, the previous opinion with respect to intervention by petitioner, 173 F. 2d 745, which appears at R. 146.

The court decided No. 12436 upon the basis of the record printed for No. 11978 and the record printed for No. 12436, (all the district court proceedings being under Number 1148-M-Civil). Certified copies of these printed records, duly certified by the Clerk of the Circuit Court of Appeals, have been filed with the Clerk of the United States Supreme Court.

The facts of this litigation may be stated as follows:

Plaintiff, Lucy Eristavi-Tchitcherine, a Florida resident, brought suit against W. M. F. Magraw, and Ivy Blount, citizens of Florida, J. A. Lasser, and B. A. Winkel, the Deauville Corporation, and others, alleging, insofar as now material, that she was the principal stockholder of the Deauville Corporation; that on May 15, 1944, Deauville Corporation entered into an agreement with defendants Lasser and Winkel for the sale of certain property (the Mac-

Fadden-Deauville Hotel) to them for $750,000, that thereafter this sale was changed to a stock deal whereby Lasser and Winkel became the owners of 51 percent of the stock of Deauville Corporation. The complaint sought recission of the stock deal for fraud. Subsequently an amended complaint, and a second amended complaint (which joined Magraw and Blount as parties plaintiff) were filed.

Lasser and Winkel filed an answer and cross-complaint, denying all charges of fraud, but nevertheless offering to rescind the stock deal and surrender their ownership of 51% of the stock, praying, however, for specific performance of their sales agreement with Deauville Corporation.

On March 26 and April 24, 1947, the district judge filed opinion orders for judgment on the pleadings, determining that the stock ownership of Lasser and Winkel be canceled (in accordance with plaintiff's request and the conditional acquiescence of Lasser and Winkel) but determining that regardless of fraud in regard to the stock deal, Lasser and Winkel had a valid purchase contract with Deauville Corporation for the purchase of the hotel, and were entitled to specific performance.

In an opinion filed November 7, 1947, the circuit court of appeals reversed, holding that defendants were not entitled to a judgment of specific performance on the pleadings, that proof of fraud as alleged by plaintiff might—but would not necessarily—lead to a decree refusing specific performance as a matter of discretion, and that the case should have been tried out for the purpose of determining whether, first, defendants have a valid contract of purchase, and second whether equity will grant specific performance or leave them to their remedies at law against the Deauville Corporation. 164 F. 2d 144; reprinted in Appendix.

Petitioner, Deauville Associates Inc., filed a petition for intervention in the proceeding on January 16, 1948 and a

supplemental petition for intervention on February 13, 1948 (R. 26, 74).[2] Petitioner alleged that for substantial sums of money as consideration, Lasser and Winkel assigned to petitioner all their interest in the controversy, including all their right, title and interest in and to the purchase agreement of May 8, 1944 with Deauville Corporation, specific performance of which is being sought in this proceeding; that Lasser and Winkel first held part of the stock in petitioner corporation but no longer hold any such stock; that petitioner believes that Winkel and Lasser are conspiring to defraud petitioner of its interest; and that representation of petitioner's interest by Winkel and Lasser is inadequate, that petitioner may be bound by any judgment and that petitioner's interest in the disposition of the property involved, in the custody of court receivers of Deauville Corporation, appointed January 15, 1948, may be affected.

The district court denied intervention on the ground that the defendants Lasser and Winkel had acted in violation of an injunction by purporting to transfer stock certificates in Deauville Corporation[3] and that petitioner's principal stockholder either knew or was chargeable with knowledge of this injunction. This ground was subsequently rejected by the circuit court of appeals as reason for denying inter-

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[2] These petitions referred back to allegations in a petition for intervention filed on May 8, 1947, but the earlier petition was no longer pending when the two subsequent petitions were filed.

These petitions are set forth in printed Record No. 12436 at R. 417 (May 8, 1947); R. 2 (Jan. 16, 1948); R. 8 (Feb. 13, 1948). That record also contains the orders of the District Judge denying leave to intervene, April 1, 1948 (R. 408), and denying a stay order or supersedeas bond, April 8, 1948 (R. 412).

[3] The opinion order is set forth in Record No. 12436, p. 408.

The injunction appears at p. 69 of Record in No. 11978. It was obtained from the state judge upon exhibiting the complaint and in advance of answer. It enjoined the defendants from transferring their stock interest, but did not enjoin in any way assignment of rights under the purchase agreement.

vention. In any event, it had no application whatever to the assignment by defendants to petitioner of all their right and interest in and to their prior purchase agreement of May 15, 1944, which was not in violation of any order.

On April 1, 1948, the district judge denied petitioner's application to intervene. On April 8, 1948, the court ordered that since petitioner is not a party it would not grant a stay order or fix a supersedeas bond. Petitioner sought a writ of mandamus from the circuit court of appeals but on April 16, 1948, that court refused mandamus to set aside an appealable order without prejudice to consideration of all questions upon an appeal (R. 138, 148).

Petitioner thereupon appealed to the circuit court of appeals which on April 4, 1949 reversed the ruling of the district judge. Its per curiam opinion stated that whether or not defendants violated an injunction in transferring their interests, that should not necessarily deprive the purchaser of whatever right, title or interest it may have acquired in such a sale, and should certainly not close the doors of the court to the purchaser in defense of its property. The court stated that petitioner clearly comes within the purview of Rule 24(a) of the Rules of Civil Procedure, that it alleges that it has succeeded to the interest of Lasser and Winkel and that it has no representation of its interests, and that under these allegations it is entitled to its day in court. It reversed and remanded with instructions to permit petitioner to intervene as of this date (R. 146-148).

On June 22, 1949, respondents as receivers of Deauville Corporation, filed a petition requesting to reoffer the hotel property for sale (R. 65). On June 27, 1949, petitioner filed in one pleading both an answer objecting to that petition for authority to sell, and a cross-petition (R. 72-79).

This cross-petition renewed the allegations of a petition filed on May 31, 1949, to set aside the orders thereto-

fore entered in this cause (R. 25): petitioner averred that its rights under its petitions for intervention filed January 16, 1948 and February 13, 1948, remained undetermined; that on December 10, 1948, the District Court had entered a decree in the cause; and that by its purported decrees the District Court had disposed of and is attempting to dispose of property rightfully belonging to this cross-petitioner as assignee of the defendants Lasser and Winkel without the cross-petitioner having had its day in court, although its petitions for intervention were on file. (R. 73-78.)

It may be noted that the judgment adverse to defendants Lasser and Winkel entered December 10, 1948, canceled their stock interest in Deauville Corporation and declared their agreement of May 15, 1944, with Deauville Corporation, to be of no force and effect whatever. The decree also provided for fees of $100,000 for attorney's fees for services rendered by attorneys Charles Danton, and D. H. Redfearn and R. H. Ferrell to Deauville Corporation, and additional fees for services rendered by said attorneys to defendants Lasser and Winkel (R. 76). This decree was appealed by Winkel and Lasser's administratrix but the appeal was dismissed on motion of appellees and without objection, for want of prosecution (R. 137).[4]

The intervenor's cross-petition also attacked certain orders relating to the receivership and counsel fees, and denied the existence of diversity citizenship requisite to federal jurisdiction, and accordingly prayed that all orders theretofore entered be vacated and the cause remanded to the state court (R. 78).

Respondents filed on June 28, 1949 a motion to strike the cross-petition upon the ground of lack of interest in petitioner, as established by the decree of December 10, 1948,

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[4] A certified copy of this decree, referred to in the opinion below (R. 137), has been filed with the Clerk of the Supreme Court.

adverse to Lasser and Winkel, and averring that petitioner had no right to relitigate matters decided by the decree of December 10, 1948 (R. 79-81).

On the same day, June 28, 1949, the District Court ordered that this intervenor's cross-petition be stricken and denied (R. 81), and further ordered that the receivers be directed to sell the hotel property (R. 82).

The Circuit Court of Appeals affirmed, in an opinion stating that petitioner did not have an absolute right of intervention under Rule 24(a), that the previous ruling of the circuit court of appeals permitted petitioner to intervene as of the date of the ruling and that petitioner cannot question rulings made prior to April 4, 1949. It also held that the issue of federal jurisdiction was *res judicata* and on the merits that there was federal jurisdiction based on diversity of citizenship and a separable controversy (R. 134-137).

Specification of Errors to Be Urged

The Court of Appeals for the Fifth Circuit erred:

1. In holding that petitioner was disabled from attacking any orders or decrees entered prior to April 4, 1949.

2. In failing to hold that petitioner is entitled to its day in court and to move to vacate decrees made by the District Court subsequent to the date of the intervention application filed on January 16 and February 13, 1948, including particularly the decree of December 10, 1948, adverse to the original defendants Lasser and Winkel who had previously assigned their entire interest to petitioner.

3. In ruling on April 4, 1949, that under the allegations in the intervention applications, that petitioner has succeeded to the interest of defendants Lasser and Winkel and that it has no representation of that interest, peti-

tioner is within the purview of Rule 24(a) and is entitled to day in court, and in then applying that ruling so as to deny petitioner any day in court on, or any leave to file, a petition to vacate orders entered between the date of the application for intervention and April 4, 1949.

4. In ruling that the original complaint by plaintiff, a citizen of Florida, presented a separable controversy solely against citizens of other states, which supported removal from the State to the Federal courts.

5. In ruling that the existence of Federal jurisdiction is *res judicata* by virtue of prior adjudications.

6. In affirming the judgments of the District Court ordering that the cross-petition filed by petitioner be stricken and denied, and ordering respondents to sell the hotel property of the corporation.

Reasons for Granting the Writ

1. The court below has rendered a decision, on an important question of Federal law, in conflict with the decision of the Court of Appeals for the District of Columbia in *Wolpe* v. *Poretsky*, 144 F. 2d 505, certiorari denied, 323 U. S. 777.

The question is this: An application for intervention is filed pursuant to Rule 24(a) of the Federal Rules of Civil Procedure, setting forth that applicant has an interest in a pending controversy, that the representation of applicant's interest in the controversy is inadequate and the applicant is or may be bound by a judgment in the action. Although Rule 24(a) grants intervention as of right, the District Judge erroneously denies leave to intervene. Upon appeal, the Circuit Court of Appeals reverses the refusal to grant leave to intervene. Is the applicant (a) permitted to exercise the rights a party might exercise at the time the petition

for intervention was filed, or (b) disabled from contesting or attacking all orders or decrees entered prior to the date the appellate court reversed the denial of leave to intervene.

The court below held as per (b). On February 13, 1948, petitioner filed its supplemental application to intervene, alleging that it held by assignment all the rights of original defendants Lasser and Winkel, whose answer alleged they were rightfully entitled to the majority stock interest in Deauville Corporation, and whose cross-complaint sought specific performance of their agreement to purchase a hotel from Deauville Corporation for $750,000. Petitioner's application to intervene under Rule 24(a) set forth the inadequacy of their representation of the interest which they had assigned to petitioner for a valuable consideration. On April 1, 1948, the District Court erroneously denied leave to intervene, and that order was reversed by the Circuit Court of Appeals on April 4, 1949. But intervenor's efforts to protect its rights as asserted in the intervention petition—and specifically to contest the decree of December 10, 1948, entered against original defendants and cross-complainants on the merits without giving petitioner a day in court—were rejected below on the ground that petitioner cannot attack any order entered prior to April 4, 1949.

In *Wolpe* v. *Poretsky,* the court held as per (a)—that the intervenor may exercise all the rights of a party as of the time of filing the petition for intervention. In that case a land-owner brought a suit to enjoin enforcement of a zoning order and obtained an injunction. After the zoning commission decided not to appeal an adjoining land-owner sought leave to intervene. Leave to intervene was denied by the District Court. The Court of Appeals reversed on the ground that intervention should have been granted as a matter of right under Rule 24(a), and that even if this

were a case of permissive intervention denial was an abuse of discretion.

The court then held that reversal of the erroneous denial of leave to intervene carries with it preservation of intervenor's rights or claims *as of the date of filing the petition for intervention.* See 144 F. (2d) at 508:

> "When they filed their petition for intervention appellants had all the rights of a party *at that stage of the proceedings.* This, of course, includes the right of appeal. Since the time for appeal had not expired when appellants sought to intervene they should be made parties with the right to appeal and all other rights a party might exercise *at the time their intervention was filed* (Emphasis added).

The decision below is also in conflict with *Pyle-National Co.* v. *Amos,* 172 F. 2d 425, decided by the Circuit Court of Appeals for the Seventh Circuit, although the *ratio decidendi* is not as clearly spelled out in the *Amos* case. A corporation brought suit against three officers for approximately $700,000, for misappropriation of funds. A stockholder notified the corporation he would intervene if four directors were not joined as defendants. On February 17, 1948, the stockholder learning that a settlement was to be consummated in District Court at 2 p. m. that day, filed a petition to intervene a few minutes before 2 o'clock. The District Court denied the petition to intervene, and then entered a court judgment against defendants for approximately $350,000.

The Circuit Court of Appeals held: (1) In view of the charges of wrongdoing against the corporation's directors, the stockholder should have been permitted to intervene under Rule 24(a). (2) But he cannot take an appeal from the judgment on the merits. (3) However, the order denying leave to intervene is reversed and remanded with instructions to permit the stockholder to intervene, and to

file a petition embodying the purposes of his original petition:

> "• • • and which may at the same time and in the same proceeding challenge the integrity of the consent judgment of February 17th, 1948 in favor of plaintiff and against defendants" (172 F. 2d at 429).

2. This is not merely a case involving one of the new Rules of Civil Procedure. A rudimentary principle of justice is at stake,—that a man should have his day in court. In *Leary* v. *United States,* 224 U. S. 567, this Court reversed the refusal to grant leave to intervene. In that case, as in the case at bar, intervenor's claim to property was based on an assignment by defendant for a consideration, and intervenor had previously permitted defendant to carry on the litigation. Intervenor now claimed that representation by defendant would be inadequate. Justice Holmes put it quite simply, that intervenor "fairly may ask a chance to protect herself." (p. 576.)

Indeed in the present case the intervention application was made in advance of trial, while in the *Leary* case this Court permitted intervention after all the evidence had been taken, and further permitted intervenor to recall and cross-examine witnesses who had already been called by the plaintiff. See 224 U. S. at 576.

Certainly it would be unjust to prevent intervenor from questioning decrees filed subsequent to the filing of the petition for intervention where, as here, petitioner was immobilized by the error of the District Judge in refusing leave to intervene. Lasser and Winkel were still parties defendant, but they no longer had any real interest in the case, having assigned to petitioner all their rights under the sales agreement and in the litigation. The intervention application also contained allegations fearing fraud and conspiracy on their part adverse to the interests of

petitioner. In due course they even failed to prosecute the appeal from the final decree.

Immediately after the District Court's denial of intervention petitioner twice sought to minimize the consequence of the District Court's error: However, the District Judge refused a stay and supersedeas bond, on the ground that petitioner was not a party; and petitioner's application to the Circuit Court of Appeals for mandamus was rejected on the ground that the order was appealable. It is unfortunate that appellate correction of error below requires time for appeal. But either respondents must now litigate with petitioner the questions petitioner never had an opportunity to litigate, or else petitioner will never have had its day in court. The consequences of the District Court's error should be borne by the parties who wrongfully opposed the intervention, and not by petitioner who was erroneously denied leave to intervene.

3. It was noted below that petitioner did not apply to this Court for certiorari to review the ruling of April 4, 1949. That ruling was a two-page opinion which triumphantly vindicated petitioner's position that it was entitled to intervene under Rule 24(a), and which concluded that petitioner "is entitled under those allegations to its day in court" (R. 149). The brief closing phrase permitting intervention "as of this date" was in no way discussed or explained. It was not then established that this opinion in support of intervenor's day in court would be applied so as to make that day in court meaningless.

Reference should be made in this connection to decisions holding that even an intervenor first coming into a case may in appropriate cases examine orders entered prior to the date of intervention (*Cincinnati, Ind. and W. R. Co.* v. *Indianapolis Union Ry. Co.*, 270 U. S. 107, 115), or recall witnesses for cross-examination though the hearing has

already been completed (*Leary* v. *United States*, 224 U. S. 567). Certainly where an appellate court directs intervenor to come into court anew, after ruling that there was error in refusing the original petition for intervention, the cases indicate that the new pleading of intervenor may attack rulings made subsequent to the original application to intervene. *Pyle-National Co.* v. *Amos*, 172 F. 2d 425 (C. C. A. 7th). The opinion of April 4, 1949, was certainly not such a clear-cut holding to the contrary as to impel or even justify applying for certiorari at that time,—in advance of decrees implementing the appellate ruling so as to deny petitioner its day in court.

The Court's opinion of April 4, 1949, was somewhat unclear but its present reading of its opinion is truly puzzling. The previous opinion was squarely bottomed upon Rule 24(a)—which expressly accords an absolute right of intervention—yet the court below now believes petitioner's right is not absolute. A phrase in the earlier opinion—that petitioner is entitled to the fruits of the suit that would otherwise have been awarded to Lasser and Winkel—seems in that opinion to be a reason why petitioner is protected by Rule 24(a); but it is now twisted into a limitation of petitioner's rights as an intervenor. The limitation on petitioner's rights is now stated to be justified by the fact that petitioner is an assignee. That seems immaterial under *Leary* v. *United States*, 224 U. S. 567. But in any event there is not a single word in the earlier opinion even suggesting the idea that an assignee has less rights under Rule 24(a) than anyone else, or that an assignee is rightfully left to inadequate representation of its status as real party in interest so far as the trial on the merits is concerned.

On the contrary, the entire thrust of the earlier opinion was the insistence that the assignee is entitled to inter-

vene even though the assignor acted in violation of a court injunction in making the assignment. And even that problem had application only to the defendants' purported transfer of a stock interest, and not to their transfer of rights in the agreement to purchase the hotel.

In short, there was ample scope in the previous opinion of April 4, 1949, for an application which would grant rather than deny applicant a real "day in court." The court below erred in giving it a contrary application.

In any event there is no doubt that the ruling of the court below is fully reviewable by this Court. Even where the Circuit Court of Appeals has previously ruled against a party on the merits, and subsequently applies its earlier decision as "the law of the case," the Supreme Court is free to rectify an error made in the previous opinion by the Circuit Court of Appeals. *John Simmons Co.* v. *Grier Bros. Co.*, 258 U. S. 82; *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U. S. 251, 258; *Rogers* v. *Hill*, 289 U. S. 582, 586-588.

Conclusion

The court below has decided an important question of Federal law in such a way as to deny petitioner a day in court on the merits of the case. It has rendered a decision in conflict with the decision of another circuit court of appeals on the same question under the Federal Rules of Civil Procedure. The decision conflicts in principle with applicable decisions of this Court prior to the adoption of the Rules of Civil Procedure, and the question arising under the Rules is one which should be settled by this Court. Accordingly this petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 30, 1950.

APPENDIX

Rule 24 of the Federal Rules of Civil Procedure provides:

Intervention

(a) *Intervention of Right.* Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is [5] in the custody or subject to the control or disposition [5] of the court or an officer thereof.

(b) *Permissive Intervention.* Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action.[5] In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

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[5] The words "which is" and "or subject to the control or disposition" in (a), and the second sentence in (b), were added by amendment effective March 19, 1948.

Published in 164 F. 2d 144

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 11978

LUCY ERISTAVI-TCHITCHERINE, WILLIAM M. F. MAGRAW, and IVY T. BLOUNT, as Trustee, *Appellants*,

versus

J. A. LASSER, B. A. WINKEL, and THE NEW DEAUVILLE, *Appellees*

Appeal from the District Court of the United States for the Southern District of Florida

(November 7, 1947)

Before Sibley, Hutcheson, and Holmes, Circuit Judges

HUTCHESON, *Circuit Judge:*

Appealing from a judgment rendered April 24, 1947, for specific performance granted on the pleadings,[1] appel-

[1] This long drawn out pleading controversy running through 233 printed pages was begun by the filing on April 24, 1945, of a bill of complaint against the appellees, narrating the transactions and dealings which appellant Tchitcherine, as the owner of substantially all the stock of the Deauville Corp., had had with appellees, and characterizing them as attended on defendants' part with fraud and wrong doing.

These included the execution of a sales contract between Deauville Corp., as seller, and Winkel and Lasser, as buyers, the later "abandonment of the sale of said property and the merger" of all of the agreements for its sale, and all transactions connected with them, into a stock deal by which the defendants Lasser and Winkel became the owners of 51 percent of the capital stock of the corporation.

There was an offer to do equity and a prayer for "rescission of all transactions and dealings" between plaintiff and defendant.

On June 8, 1945, an amended complaint was filed, followed on September 24, 1946, by a second amended complaint in which the other appellants, Wm. M. F. Magraw and Ivy Blount, as trustee, joined with the original plaintiff. This complaint, going in much greater detail into the transactions and occurrences with which the original complaint dealt, charging that the conduct of the defendants had been characterized by fraud and overreaching and misdealing throughout, and offering to do

lants are here insisting that the case was not one for determination on the pleadings but for trial on the merits and that, upon proof of the facts the pleadings put in issue, specific performance ought to, and would, have been denied.

On November 25, 1946, plaintiffs moved for an order on the pleadings which would require the defendants to assign and transfer to the plaintiff Tchitcherine all of their right to the 51 shares of stock and would reserve for consideration and judgment all issues of law and fact raised on the cross-complaint for specific performance.

On January 16, 1947, defendants moved for judgment in their favor on the pleadings, and on January 21st, they amended their cross-complaint to pray that the court enter an order rescinding and cancelling the stock deal and enforcing the sales contract.

On March 26, and April 24, 1947, the district judge filed what he designated as opinion orders in which he analyzed the pleadings and reached the conclusion that as to the validity and enforcibility of the sales contract, as distinguished from the stock deal, no issue of fact was made, determined that the stock ownership should be cancelled and the sales contract be specifically enforced, and ordered that by May 9, 1947, the defendants do certain acts with reference to the stock, and the Deauville Corporation execute and deliver a warranty deed to the property in suit. It was further ordered that on said day a master would be appointed to state and settle the accounts between plain-

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equity, sought an examination of all the facts connected with the stock deal and its rescission and cancellation for fraud.

On November 4, 1946, the defendants filed their answer and their cross-complaint for specific performance of the Deauville Corp. sales contract. In these pleadings they denied all charges of fraud and overreaching and, offering to surrender their ownership of 51 percent of the capital stock of the corporation, they urged that the sales contract be specifically enforced.

On November 25, 1946, plaintiffs filed their answer to the cross-complaint. In it they denied that the sales contract was a valid one, realleged all the matters set out in their second amended complaint and alleged that the contract was void for want of mutuality and that, because of the fraudulent acts and conduct of defendants set out in the answer and in their former pleadings in connection with the subject matter of the sales contract and the subsequent stock deal, the order ought not to be enforced.

tiffs and defendants arising out of and connected with their dealings and transactions, said accounting to include the issues of fraud tendered as to this stock deal.

We cannot agree with the district judge that the matter of the stock deal and the sales contract and the dealings of the defendants with which the pleadings deal can be separated into such water tight compartments as to authorize a decree of specific performance without a hearing on the whole case and a determination on the facts as developed on the trial as to whether in justice and equity defendants are entitled to such a decree. Specific performance is not grantable as a matter of right, but only as a matter of equity, and in the exercise of a sound and informed discretion upon a knowledge of the whole facts. Wherever, therefore, the truth of the matters bruited may lie, whether there is a real fire beneath, and accounting for, the smoke of the accusations is not a matter which ought to, or may be, determined on pleadings and without a trial of the facts. Without then determining whether the specific performance defendants prayed for should or should not be ordered upon the whole facts, we think it quite clear that it ought not to have been ordered on the pleadings but that the case should have been tried out upon all the matters tendered, for the purpose of determining whether, first, defendants have a valid contract of purchase, and, second, if they have, whether equity will specifically enforce it or leave defendants to their remedies at law.

The district judge, in turning his decision as he did, upon the established principle that the "clean hands" maxim [2] is not intended to, and does not, operate punitively, and that its applicability depends upon the connection between the complainants' iniquitous acts and the defendants' conduct, which the complainants rely upon as establishing their cause of action, looked too closely on the limitations, not closely enough on the scope, of the maxim. But more than that, he seemed to overlook the fact that the remedy of specific performance which defendants sought, is not accorded as a matter of right to every suitor but only upon

[2] 19 Am. Jur., "Equity," Secs. 469, 473-4-5.

equitable considerations [3] to those who can make out an equitable case for it. It is not meant by this to say that if plaintiffs prove what they have alleged, the court must deny specific performance. It is meant only to say that defendants are not entitled to a decree for specific performance on the pleadings. Whether the case is one for specific performance must wait upon a hearing and determination as to the facts and the decision by the chancellor upon them in the exercise of a sound and informed discretion.

The judgment is REVERSED and the cause is REMANDED for further and not inconsistent proceedings.

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[3] 49 Am. Jur. "Specific Performance," Secs. 6 to 9, incl.; CF. *Goudeau* v. *Daigle*, 124 F. (2) 656; *General American Life Ins. Co.* v. *Natchitoches Oil Mill, Inc.*, 160 F. (2) 140.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1950

No. 165

DEAUVILLE ASSOCIATES, INC.,

Petitioner,

vs.

JOHN M. MURRELL and D. H. REDFEARN, as Receivers of Deauville Corporation,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

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The petition for certiorari presents two questions; one as to intervention and the second as to diversity jurisdiction (Pet. 2). Both questions were adjudicated adversely to the position now taken by the petitioner, by final and binding orders of the district court and the Court of Appeals for the Fifth Circuit made long prior to the entry of the orders below. The jurisdictional question was determined on May 29, 1945 adversely to the position taken by petitioner, by denial of a motion to remand the case to

the state court without an appeal having been taken therefrom (R. 110, case 11978). The question of the extent of petitioner's right to intervene was determined adversely to petitioner on April 4, 1949, rehearing denied, May 2, 1949 (**Deauville Associates, Inc. v. Eristavi-Tchitcherine,** 173 F. (2d) 745, C.A. 5).

The petition for certiorari proceeds as though review were now being sought of the decision as to intervention rendered in the foregoing case, although the time to seek review of that decision has long since expired. Actually, all that is involved in the decision below was the affirmance of two orders of the district court entered June 28, 1949, under circumstances which will hereafter be reviewed.

RECORD IN THE CASE

The transcript of the record in this case filed in this Court and containing the said two orders of the district court of June 28, 1949, and the judgment of the court of appeals affirming such orders (R. 136, 142), consists of 149 pages. The petition, however, refers to two other transcripts of records in the Court of Appeals for the Fifth Circuit, being case numbers 11978 and 12436, aggregating over 1100 pages, which are, respectively, the cases of **Eristavi-Tchitcherine v. Lasser,** 164 F. (2d) 144 and **Deauville Associates, Inc. v. Eristavi-Tchitcherine,** 173 F. (2d) 745. The petition states that "Certified copies of these printed records, duly certified by the Clerk of the Circuit Court of Appeals, have been filed with the Clerk of the United States Supreme Court" (Pet. 3). Respondents have been unable to ascertain from the petition whether petitioner filed the number of such additional transcripts required by the rules of this Court, but in any event respondents were not served with these additional transcripts.

STATEMENT OF THE CASE

Petitioner's statement of the case presents an incomplete picture of the background of the litigation, and accordingly, the indulgence of this Court is asked in presenting a more accurate and complete statement.

Deauville Corporation, of which respondents are the duly appointed receivers, is a Delaware corporation owning the reversion to the leasehold interest in the Macfadden-Deauville Hotel in Miami Beach, Florida. The petitioner, Deauville Associates, Inc., a Michigan corporation, has been seeking to purchase the hotel property under a contract of sale which it claimed had been made to J. A. Lasser and B. A. Winkel and assigned by them to petitioner. The litigation over this property has been continuous for more than five years, and various phases of it are contained in the records which the petitioner seeks to bring before this Court.

The original bill of complaint was filed February 16, 1945 in the Circuit Court, 11th Judicial Circuit, Dade County, Florida by the plaintiff, a Florida resident, who used the name "Princess Lucy-Eristavi Tchitcherine" against defendants Lasser and Winkel (R. 2, case 11978). The complaint sought cancellation, on grounds of fraud and misrepresentation, of 51% of the stock of Deauville Corporation which had been issued to Lasser and Winkel, an accounting and other relief. No relief was asked against any of the defendants other than Lasser and Winkel, non-residents of Florida (R. 87, case 11978), and presumably these other defendants were joined in the action merely in an effort to destroy diversity of citizenship and insure retention of jurisdiction in the state court.

The case was removed to the federal district court and docketed there under No. 1148-M-Civil, on April 24, 1945, by Winkel and Lasser on grounds of diversity of citizen-

ship (R. 92, case 11978), and an unsuccessful effort was made to have the case remanded (R. 110, case 11978). No appeal was taken from the order denying the motion to remand the case, and when the amended bill of complaint was thereafter filed in the district court the defendants, other than Winkel and Lasser and two non-resident corporate defendants, were omitted as defendants (R. 156, case 11978).

Lasser and Winkel filed a cross-complaint for specific performance of an alleged contract to purchase the Deauville Hotel property (R. 15, 33, 209, case 11978), claiming in effect that this contract had been exchanged for the acquisition of 51% of the stock of Deauville Corporation, and that if plaintiff were now seeking cancellation of such stock, then Lasser and Winkel desired reinstatement of their rights under the previous contract to purchase the property itself.

At the time the complaint was originally filed in the state court to effect cancellation of the stock, that court issued an injunction prohibiting the defendants from transferring or encumbering such stock (R. 69, case 11978), and such injunction is still in force. On February 21, 1947, over two years after the case had been started, a man from Detroit named Isadore Kowal, and also known as Isadore Kowalsky (R. 369, 381, case 12436), appeared in the district court and filed stock certificates representing 51% of the stock of Deauville Corporation, which he asserted he and his two sons had acquired from Lasser and Winkel (R. 297, 302, case 11978). The apparent purpose of filing the certificates was to avoid possible contempt proceedings as the result of having acquired such stock in violation of the injunction prohibiting its transfer by Lasser and Winkel. Kowal and his two sons also filed in court disclaimers of all interest in the stock (R. 2-15, case 11978, suppl. rec.).

At that time the petitioner herein, Deauville Associates, Inc., a Michigan corporation, had not yet been organized, and it was first incorporated by Kowal on March 12, 1947, over two years after the litigation had commenced (R. 37, case 12436). Thereafter, such corporation also disclaimed all interest in the said 51% of the stock of Deauville by instrument filed in the district court on June 3, 1947 (R. 461-2, case 12436).

Accordingly, the only possible interest which the petitioner, Deauville Associates, Inc., could now assert in the litigation results from an alleged assignment from Lasser and Winkel to Kowal and his two sons and in turn to the petitioner, of the claimed right to specific performance of the agreement to purchase the Macfadden-Deauville Hotel.

On page 7 of the petition for certiorari and in the cross-petition which was stricken, beginning with paragraph (e) (R. 76), allegations are made which have no bearing on the case whatsoever and seem to have been included for the purpose of trying to prejudice the court. Said allegations complain as to fees and costs and expenses of litigation which have been awarded against Deauville Corporation, a Delaware corporation, the owner of the hotel property. The petitioner, Deauville Associates, Inc., a Michigan corporation, has no interest in Deauville Corporation whatsoever. It disclaimed in open court, by a written instrument under seal, dated May 24, 1947, any interest in the stock of Deauville Corporation (R. 461, case 12436). Therefore, any charges or expenses of litigation against Deauville Corporation are no concern whatsoever of the petitioner, Deauville Associates, Inc., as it relies entirely on its alleged rights to enforce the purchase agreement of Lasser and Winkel.

INTERVENTION

As indicated above, the petition proceeds as though the issues before the Supreme Court now involved the right of Deauville Associates, Inc., to intervene in the action. Petitioner asserts no interest in this case, except to the extent that it had acquired an interest from Kowal and his two sons, who in turn claimed to have acquired their interest by assignment from Lasser and Winkel. The petitioner could not have acquired any interest upon which to base a petition for intervention until at least March 12, 1947, the date of its incorporation. Since the action had then been pending for over two years, petitioner was merely a purchaser of an interest in property **pendente lite**, after a lis pendens affecting such property had been filed (R. 59, 153, case 11978).

Actually, petitioner did not attempt to intervene until May 8, 1947, when it filed a petition for intervention (R. 417, case 12436). Intervention was denied by order of the district court made May 13, 1947, and no appeal therefrom was taken (R. 443-4, case 12436).

The petitioner made no further attempt to intervene until January 16, 1948, when it filed a new petition in which it asserted only that defendants, Winkel and Lasser, had assigned to it a final decree made by the district court on April 24, 1947, in case number 1148-M-Civil, which granted specific performance of the contract referred to above to purchase the Deauville Hotel property (R. 1, 2, case 12436). However, this final decree was reversed on appeal by the court of appeals on November 7, 1947, and the case was sent back to the district court for trial (**Eristavi-Tchitcherine v. Lasser**, 164 F. (2d) 144.

On February 13, 1948, the petitioner filed a supplemental petition to intervene (R. 8, case 12436), asserting the same rights originally asserted in its petition for intervention

of May 8, 1947, which as already noted, had been disallowed, and claiming a right both to the stock of Deauville Corporation and the alleged contract to purchase the Deauville Hotel, even though it had previously filed a disclaimer in the district court acknowledging that it had no interest in such stock (R. 461, case 12436).

On February 20, 1948, the defendants Lasser and Winkel filed their answer (R. 22, case 12436) to the supplemental petition for intervention filed by the petitioner herein. In this answer, Lasser and Winkel claimed that their former attorneys of record (one of whom was Samuel H. Rubin [R. 215, case 11978], who is now one of the attorneys for the petitioner herein, and also Secretary of Deauville Associates, Inc., the petitioner) had been making secret agreements with Kowal, contrary to the interests of Lasser and Winkel; that Kowal and Deauville Associates, Inc., were acting in bad faith and did not come into equity with clean hands; that Kowal had given false testimony in the proceedings; and Lasser and Winkel requested that the supplemental petition for intervention be denied and dismissed.

The district court denied the petition to intervene on April 1, 1948 (R. 408, case 12436), on the ground that Kowal, president of the petitioner herein, either had knowledge of, or was charged with knowledge of, the injunction which he had violated in acquiring the 51% of the stock of Deauville Corporation. Accordingly, no decision was rendered as to the other issues of unfair dealing, conspiracy and false testimony presented by the answer of Lasser and Winkel to the supplemental petition to intervene.

On appeal, the court of appeals held that the fact that Deauville Associates, Inc., the petitioner herein, had acquired its alleged interest in violation of an injunction

should not prohibit it, as a means by which it should purge itself of contempt, from intervening in the case; that the transaction between Lasser and Winkel and the petitioner was doubtless binding upon them, and "if so, petitioner doubtless has the right to have such fruits of the suit awarded to it under the contract as might otherwise have been awarded to Lasser and Winkel." Accordingly, the court of appeals reversed the order below with directions "to permit the petitioner to intervene in said cause as of this date," which was April 4, 1949. **Deauville Associates, Inc. v. Eristavi-Tchitcherine,** 173 F. (2d) 745.

The court did not pass upon the issues presented by the answer filed by Winkel and Lasser to the supplemental petition for intervention of Deauville Associates, Inc., but, as appears from the above quotation, in effect held that "if" the assignment by Lasser and Winkel to the assignors of Deauville Associates, Inc., was binding upon the parties to those transactions, then Deauville Associates, Inc., would be entitled to the "fruits of the suit," which might otherwise have been awarded to Lasser and Winkel.

However, it is quite apparent that before Deauville Associates, Inc., would be entitled to such "fruits of the suit" as might otherwise be awarded to Lasser and Winkel, it must meet the issues of fraud, conspiracy, perjury and other issues presented by the answer of Lasser and Winkel to its supplemental petition to intervene. These issues have not yet been tried in the district court, and petitioner has made no effort to attempt to have these issues adjudicated, although it has had the right to do so since February 20, 1948, the date the answers of Lasser and Winkel were filed (R. 22, case 12436).

As will more fully be developed below, no effort was made to seek review of the said decision of the court of appeals granting petitioner a limited intervention, other

than a petition for rehearing filed by the petitioner herein, which was denied on May 2, 1949 (173 F. (2d) 745).

ORDERS APPEALED TO THE COURT OF APPEALS TO WHICH PETITION FOR WRIT OF CERTIORARI IS DIRECTED

The final decree entered December 10, 1948, in case No. 1148-M-Civil, authorized the receivers to sell the Deauville Hotel property. On May 5, 1949, the receivers filed a petition (R. 1) for instructions as to selling such property. Deauville Associates, Inc., filed its answer (R. 8) to this petition, and, after a hearing on the pleadings, the court authorized the receivers to sell the property on June 1, 1949 (R. 23).

Before the sale took place, Deauville Associates, Inc., petitioner herein, filed, on May 30, 1949, in the United States Court of Appeals, a petition for writ of prohibition seeking to prohibit Hon. John W. Holland, District Judge, from exercising jurisdiction in said case (1148-M-Civil), on the ground that the federal court had no jurisdiction. This petition for writ of prohibition was docketed in the court of appeals under No. 12833. The Hon. John W. Holland, district judge, filed his answer to the petition for writ of prohibition on June 6, 1949. This petition for writ of prohibition was denied by the court of appeals on June 21, 1949.

As this petition for writ of prohibition was pending on June 1, 1949, the date which had been set by the order of Judge Holland for the sale of the property, the receivers could not complete the sale, and, after the petition for writ of prohibition had been denied, the receivers, on June 22, 1949, filed their petition for resale, and prayed that after a hearing "they be allowed to readvertise said property for sale at public outcry" at a certain upset price recommended by the receivers (R. 65).

On June 27, 1949, petitioner herein filed an answer which included a cross-petition in which it claimed that the district court lacked requisite diversity jurisdiction over the original action commenced in the state court on February 14, 1945 and removed to the federal court by petitioner's assignors, Lasser and Winkel. The cross-petition prayed that the receivers' petition for resale of the property be denied, and that the district court "divest itself of jurisdiction which it has assumed in this cause, vacate all orders and decrees heretofore made by it, except that this Court enter its order in conformity with law remanding said cause to the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida." (R. 73). Respondents moved to strike the cross-petition (R. 79).

On June 28, 1949, the district court entered an order striking the cross-petition (R. 81), and a further order authorizing the receivers to attempt a resale of the property, prescribing the notice to be given and directing the amount of the deposit to be made by bidder (R. 82). These are the two orders which were appealed to the Court of Appeals, as is evident from petitioner's notice of appeal (R. 106); these orders were affirmed by the decision below (R. 136, 142).

The appeal herein was taken July 6, 1949, but no supersedeas was obtained and, therefore, the sale was held on August 1, 1949. No bid was received which could be accepted, and accordingly, the sale authorized to be made on August 1, 1949, did not take place (R. 115-19).

The foregoing orders are the only two orders which would be before this Court if certiorari should be granted, and not the decision, rendered over a year ago, as to petitioner's right of intervention. However, since petitioner is in effect seeking review of the decision rendered April 4,

1949, granting limited intervention, rather than the two orders of June 28, 1949, this brief will first consider the question as to petitioner's right to have that decision reviewed by this Court.

POINT I

PETITIONER'S TIME TO SEEK REVIEW OF THE JUDGMENT AS TO INTERVENTION EXPIRED ON AUGUST 2, 1949, AND SUCH JUDGMENT IS RES JUDICATA.

The petition for certiorari in effect seeks review of the decision in **Deauville Associates v. Eristavi-Tchitcherine,** 173 F. (2d) 745, decided April 4, 1949, which granted petitioner a limited right of intervention. Thus, as already noted, the first of the two questions expressly presented by the petition concerns the extent to which intervention was authorized by that decision (Pet. 2), and later, the petition restates the question as being a choice between intervention as of the date application for intervention was made, or as of the date it was ultimately granted (Pet. 9-10).

In order to appear to come within the principles which govern the granting of certiorari, petitioner relies upon an alleged conflict between such decision granting intervention as of the date of the decision, and the case of **Wolpe v. Poretsky,** 144 F. (2d) 505 (App. D. C.), cert. den., 323 U. S. 777, where intervention was granted as of the date the application therefor was filed. Mention is also made by petitioner of **Pyle-National Co. v. Amos,** 172 F. (2d) 425 (C.C.A. 7), where an order denying leave to intervene was reversed, and presumably intervention was allowed as of the date the petition was filed, although nothing to such effect is stated in the opinion.

Apart from the question of whether there is really any

conflict between the Fifth Circuit, the Court of Appeals for the District of Columbia, and the Seventh Circuit, on the same matter, as contended by the petitioner, or of whether, assuming such a conflict, the issue presented is of sufficient importance to warrant granting certiorari, there is a fundamental reason why the petition should be denied. The decision of the court of appeals in question was rendered April 4, 1949, and rehearing was denied May 2, 1949. Accordingly, petitioner's time to apply for certiorari expired on August 2, 1949.

This was well stated in the decision below, as follows, **Deauville Associates, Inc. v. Murrell,** 180 F. (2d) 275, 276:

> "Without having sought a review of this prior adjudication by application for certiorari to the Supreme Court within the time allowed, and after the expiration of several months, during which time this former decision has become final and binding, appellant now seeks to be relieved of the duty of compliance with the final wording of our former decree limiting its rights to intervene on the ground that this court had no power or authority to enter any such order."

Actually, as already noted, the orders below had nothing to do with intervention, or the date as of which it should be granted. They were merely interlocutory orders which authorized the receivers to sell property, and which denied a cross-petition of the petitioner herein. The question of intervention was injected into the proceedings below only by reason of the petitioner's having filed an answer and cross-petition to the petition of the receivers requesting leave to sell the property, and using that as a springboard to request the Supreme Court to "vacate all orders and decrees heretofore made" by the lower courts, and remand the case to the state court (R. 78).

Although the petition seeks to create the impression that

petitioner is attempting by certiorari to review the judgment as to intervention and that the precise issue presented is an alleged choice between two different rules of intervention, in two different circuits, petitioner cannot avoid the fact so clearly noted by the court below, that the time to seek review of the decision as to intervention expired over a year ago. Accordingly, petitioner seeks to justify its failure to apply for certiorari to review such decision by stating that it was not "a clear-cut holding" which would "impel or even justify applying for certiorari at that time;" that the decision "was somewhat unclear" (Pet. 14); that the language of the opinion granting intervention "as of this date" was not "explained" by the court; and that petitioner had regarded the decision as one "which triumphantly vindicated petitioner's position" (Pet. 13).

Petitioner's time to seek a review of the decision as to intervention could not be enlarged or revived merely because it did not fully understand the decision or had erroneously regarded it as a complete victory, even if petitioner were being frank with the Supreme Court when it makes such an argument. However, petitioner is not being completely frank, and the true fact is that petitioner applied for rehearing, which alone would belie its present statement that it had regarded the decision as a triumphant vindication of its right to intervention.

The petition for rehearing commences with the statement that it was being made "solely for the purpose of obtaining a clarification of the opinion filed by this court in this appeal on April 4, 1949." Among the items raised in the petiton for rehearing was the effect of the language of the opinion of the court allowing intervention "as of this date." Thus, the petition for rehearing stated that

> "Petitioner inquires whether that portion of the Court's opinion which contains the language 'as of this date,' subjects this petitioner to a decree to which it was not a party and to a determination thereunder without this petitioner having presented proofs, evidence or witnesses, and without its having had its day in court as this court determined 'that it is entitled under those allegations;'
>
> "WHEREFORE, your petitioner prays that this court grant it a rehearing for the purpose of clarifying its opinion * * *." (Pet. for rehearing in 173 F. (2d) 745, pp. 4-5).

The foregoing refutes petitioner's statement to this Court that it did not appreciate the import of the words "as of this date" in the opinion of the court of appeals, and that it believed it had won a complete victory. The denial of its petition for rehearing should have been sufficient to awaken petitioner to the fact that it was then necessary to seek further review if it felt that certiorari was warranted.

Petitioner also argues in further excuse of its failure to make such an application at that time, that the decision of the court of appeals wasn't so clear as to justify certiorari "in advance of decree implementing the appellate ruling" (Pet. 14). In effect, it is petitioner's position that it wasn't until subsequent orders had been entered by the district court, following the decision of the court of appeals, that it realized that such decision was being construed to authorize a more limited type of intervention than petitioner desired. Assuming that this could revive a right to appeal long after the time to do so had expired, it should be noted that the orders of the district court which petitioner refers to as "implementing the appellate ruling" were both rendered on June 28, 1949, whereas the

time to seek review of the decision as to intervention did not expire until August 2, 1949. By the time the orders of June 28, 1949 had been made, petitioner must have fully appreciated that the intervention granted it did not allow it to relitigate all of the prior orders and proceedings in the case.

In further support of its effort to obtain review of the decision as to intervention, although the time to do so expired almost a year ago, petitioner states that:

> "Even where the Circuit Court of Appeals has previously ruled against a party on the merits, and subsequently applies its earlier decision as 'the law of the case,' the Supreme Court is free to rectify an error made in the previous opinion by the Circuit Court of Appeals. **John Simmons Co. v. Grier Bros. Co.**, 258 U. S. 82; **Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.**, 240 U. S. 251, 258; **Rogers v. Hill**, 289 U. S. 582, 586-588." (Pet. 15).

However, in none of the three cases cited by petitioner had there been a previous ruling "on the merits," as the petition states. In each of the three cases, the previous order of the circuit court of appeals was an interlocutory one, and this Court therefore pointed out that the party wasn't in a position to take an appeal from the earlier decision.

Thus, in **Simmons Co. v. Grier Bros. Co.**, 258 U. S. 82, 91, the Court stated that "the very fact that a final decree had not yet been entered might have been deemed a sufficient ground for refusing the writ." Similarly, in **Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.**, 240 U. S. 251, 258, the Court stated that the decree in question "was not a final one, a fact that of itself alone furnished sufficient ground for the denial of the application." Also, in

Rogers v. Hill, 289 U. S. 582, 586-7, 588, the Court stated that "The granting of temporary injunction involved no determination of the merits," and that "In any view of the matter, it is clear that the decree of the appellate court was not final and that plaintiff, in order to have the validity of the payments considered here, was not bound within three months after entry to petition this court for a writ of certiorari."

The situation here presented is an entirely different one. The decision of the court of appeals as to intervention rendered April 4, 1949, where intervention was claimed as a matter of right, was a final and appealable one. **Federal Communications Commission v. National Broadcasting Co., Inc.,** 319 U. S. 239; **Cohen v. Beneficial Loan Corp.,** 337 U. S. 541, 546; **Alston Coal Co. v. Federal Power Commission,** 137 F. (2d) 740, 741 (C.C.A. 10). Accordingly, any attempt at review by this Court would not have been open to the objection, presented in the three cases relied upon by petitioner, that the decision wasn't reviewable because of its interlocutory character.

Also, in none of such three cases cited by petitioner was the earlier decision of the circuit court of appeals, which had not been appealed to the Supreme Court, the very ground relied upon to invoke the jurisdiction of the Supreme Court as presenting a question warranting the granting of certiorari. In all of those cases there were entirely different reasons why the Supreme Court had taken the case, and then in the course of its decision it had occasion to consider the binding effect of the prior interlocutory order.

In this case, as is developed below and as petitioner apparently does not seriously dispute, the orders of June 28, 1949 made by the district court, from which the appeal to the court of appeals was taken and which are the only

orders as to which the time to seek certiorari has not expired, offer no grounds for having this Court grant certiorari, and the sole purpose of the present petition is in effect to revive petitioner's time to certiorari from a judgment of the court of appeals entered over a year ago.

In order to circumvent its failure to seek timely review of the decision as to intervention and to escape the final and binding effect of that decision, petitioner has adopted the novel device of filing an answer and cross-petition to the receivers' petition to the district court requesting authority to resell receivership property; of seeking in such cross-petition to obtain a right of intervention broader than the right which had been granted to it under an order which had already become final, and to relitigate all prior decrees and orders in the action, and requesting the court to vacate all such prior orders and decrees, and of appealing from the order authorizing a sale of the property and denying the cross-petition, and in such appeal seeking to reopen the earlier decision which had become final and binding upon the parties on the theory that it is now subject to review because it had been injected into the subsequent proceedings.

If petitioner should succeed in this effort, there would be no finality to any decisions of the court of appeals, notwithstanding the expiration of the time for applying for certiorari. All a dissatisfied litigant need do when a decision of the court of appeals has become final and binding by reason of his failure to seek further review, would be to institute a new proceeding or action at a subsequent date on a theory directly in conflict with such prior decision (or as was done here, inject into some independent proceeding a theory in conflict with such prior decision), and when met with the former decision as final and binding, challenge its correctness by applying for certiorari

to review the subsequent decision of the court of appeals which followed the prior decision as **res judicata,** claiming as error the basic unsoundness of such prior decision. This device of "lifting one's-self by one's boot-straps," in order to circumvent the finality of decisions and the binding effect of the doctrine of **res judicata,** is too obvious a one to succeed.

It is elementary that since petitioner did not seek timely review of the decision of the court of appeals as to intervention, such decision is **res judicata** or, as stated by the court of appeals in the opinion below, "has become final and binding" (180 F. (2d) 275, 276).

POINT II

EVEN IF PETITIONER WERE APPEALING FROM THE DECISION WHICH GRANTED IT A LIMITED RIGHT OF INTERVENTION, THAT DOES NOT PRESENT A QUESTION OF SUCH IMPORTANCE AS TO WARRANT GRANTING CERTIORARI, AND THERE IS NO REAL CONFLICT BETWEEN CIRCUITS ON THE SAME MATTER.

As indicated, in order to provide some semblance of a basis for an application for a writ of certiorari, petitioner has set up an alleged conflict in the decisions of two circuit courts, requiring a choice to be made by this Court. However, even assuming that the decision of the Court of Appeals for the Fifth Circuit, alleged to be in conflict with the decision of the court in **Wolpe v. Poretsky,** 144 F. (2d) 505, had not become final and binding almost a year ago but was the one for which review is now being sought, there still would be no basis for granting an application for certiorari.

It is not every apparent conflict between courts of appeal which warrants granting certiorari, but merely direct

conflicts on the same matter and on questions having some degree of public importance. The question as to the extent to which a party may be permitted to intervene in pending litigation is a matter which peculiarly depends upon the circumstances of each individual case.

Wolpe v. Poretsky, relied upon by petitioner as creating the alleged conflict between circuits, did not involve a purchase of property **pendente lite,** and it was clear that the party objecting to the zoning regulations had the right to intervene as of the time the petition was filed, by reason of all the circumstances set forth in that case.

An entirely different situation is presented in the present case of petitioner's effort to intervene. The original litigation was commenced about two years before the petitioner had even been organized. The petitioner claims that it subsequently acquired the rights of certain parties to the litigation, and later sought to relitigate every issue which had been previously adjudicated. This is apparent from its cross-petition, stricken by one of the orders appealed from, where petitioner requested the District Court to "vacate all orders and decrees heretofore made by it." It is small wonder that the court below stated, perhaps somewhat impatiently (180 F. (2d) 275, 277):

> "In fact, it appears from the record that appellant was not even formed as a corporation until approximately two years after this litigation was first begun, and yet it again urges that it should now be allowed to relitigate practically all proceedings affecting the property in dispute which have been had in the district court and reviewed by this court during the past five years. This it may not do."

There is nothing in the opinion of the court of appeals in 173 F. (2d) 745 which suggests that the court was establishing a fixed rule of practice in the circuit to the

effect that in all cases of intervention under Rule 24, the intervenor is limited to receiving the "fruits of the suit" which might have been awarded to other parties and should never be allowed to relitigate all orders and proceedings which had transpired prior to the date intervention was granted. Actually, there must be numerous instances in the Fifth Circuit where as a matter of practice, and without its even being discussed in the reported cases, an intervenor when warranted by the circumstances of the particular case was not limited to receiving the "fruits of the suit" to which some other party might be entitled, but was permitted to intervene as of the date the petition for intervention was filed. If this is so, there would not even be any conflict between the practice in the Fifth Circuit, and the practice in the District of Columbia or in the Seventh Circuit.

As already noted, the 149-page transcript in this case is the record as to the two orders below of June 28, 1949 affirmed by the court of appeals in 180 F. (2d) 275, and which would be the only orders before this court if certiorari were granted. However, the records in the other cases which petitioner refers to, namely, cases 11978 (164 F. (2d) 144) and 12436 (173 F. (2d) 745), aggregating several volumes, had already afforded the court of appeals full familiarity with petitioner's participation and interest in this litigaton, and of the fact that petitioner had acquired its alleged rights **pendente lite** after notice of lis pendens had been filed (R. 59, 153, case 11978). Undoubtedly, in view of the entire background with which that court was so familiar, it could have denied intervention altogether, especially in the light of the rule early enunciated by this Court in **Mellen v. Moline Malleable Iron Works,** 131 U. S. 352, 371, to the effect that "Purchasers of property involved in a pending suit may be admitted

as parties, in the discretion of the court; but they cannot demand, as of absolute right, to be made parties, * * *."

In that case this court recognized that the proceeding before it was "an attempt, upon the part of a purchaser **pendente lite**, to relitigate, in an original, independent suit, the matters determined in the suit to which his vendor was a party." By the same token the court of appeals in this case clearly recognized, to paraphrase the foregoing language of this court, that the cross-petition below was merely an attempt upon the part of a purchaser **pendente lite** to relitigate in an entirely independent proceeding, the matters determined in a suit or proceeding to which petitioner's vendors were parties.

If the court of appeals, on the basis of all the circumstances of this case as contained in the various records to which petitioner has adverted and which it seeks to bring before this Court on this present appeal, could have denied petitioner any intervention under the rule applicable to purchasers **pendente lite**, enunciated by this court in **Mellen v. Moline Malleable Irons Works, supra,** certainly that court could have granted petitioner a limited right of intervention to receive "such fruits of the suit" as might otherwise have been awarded to Lasser and Winkel, and to intervene as of the date, of the court's decision.

It is respectfully submitted that when this Court carefully reviews the earlier records filed with it by the petitioner, it will be satisfied that there is not even a real conflict in the decisions of the Court of Appeals for the Fifth Circuit, for the District of Columbia, and for the Seventh Circuit; that there is presented in this case a completely **sui generis** situation unlikely ever to recur; and that under all the circumstances the court of appeals was more than justified in its conclusion that intervention should be for the limited purpose of receiving "the fruits

of the suit," and that the petitioner should not "be allowed to relitigate practically all proceedings affecting the property in dispute which have been had in the district court and reviewed by this court during the past five years" (180 F. (2d) 275, 277).

As already briefly noted, even though petitioner now complains of the scope of the intervention which it was granted, there is no record that petitioner ever brought on for hearing, or took any testimony, as to the issues raised by the answer of Lasser and Winkel to its supplemental petition for intervention, or even faced these issues, so as to establish that it has the right, presupposed by the court of appeals in 173 F. (2d) 745, even to obtain "the fruits of the suit" of Lasser and Winkel, as against their contentions of conspiracy, fraud, and perjury on the part of petitioner, or its president and controlling stockholder, Kowal. Though these issues are yet to be settled petitioner ignores them, and boldly asserts a right at this late date to intervene generally for the purpose of relitigating all matters which had previously transpired.

POINT III

THE ORDERS APPEALED FROM ARE NOT FINAL ONES AND ARE NOT SUBJECT TO REVIEW BY THIS COURT.

The orders of June 28, 1949, which directed a resale of the Deauville Hotel property and which are the basic orders appealed from are not final orders. Appeal to the court of appeals was presumably authorized by Section 1292 of the Judicial Code, which gives that court jurisdiction over appeals from "(2) Interlocutory orders appointing receivers, or reviewing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property." Being

interlocutory orders, there was no basis for review by this court on application for certiorari. **John Simmons Co. v. Grier Bros. Co.**, 258 U. S. 82, 91; **Hamilton-Brown Shoe Co. v. Wolf Bros. Co.**, 240 U. S. 251, 258; **Rogers v. Hill**, 289 U. S. 582, 588.

Furthermore, it appears that no sale was effected pursuant to the authority granted to the receivers by the order of June 28, 1950, sought to be reviewed by this petition for certiorari, and that the only offer which was received was deemed unsatisfactory by the receivers who recommended its disapproval (R. 118). Therefore, the district court entered an order under date of August 9, 1949, approving the report of the receivers as to the attempted sale of the hotel property, and refusing the only offer which had been submitted at the sale which had previously been authorized (R. 126-7). Accordingly, the order of June 28, 1950, authorizing the receivers to attempt a resale of the property has in any event become moot, and on that ground alone would not be reviewable by this Court.

Moreover, neither of the orders of June 28, 1949, themselves present any question which would warrant granting certiorari, and the petition itself does not suggest the contrary, apart from its effort to seek review of the old decision of the court of appeals made April 4, 1949.

POINT IV

THE FEDERAL COURT CLEARLY HAD JURISDICTION OVER THE CASE, AND PETITIONER CANNOT NOW CHALLENGE SUCH JURISDICTION.

The petition for certiorari presents, as the second of its two questions, the issue of whether there is a requisite showing of a separable controversy as against citizens of different states, sufficient to warrant removal of the case to the district court (Pet. 2).

The action was originally commenced in the state court some five years ago, and was removed to the federal court by the two defendants, Winkel and Lasser, on the ground that there was diversity of citizenship as between them and the plaintiff, and that the cause of action against them was a separable one. The plaintiff unsuccessfully sought to have the case remanded on the ground that there was no federal jurisdiction, and no appeal was taken (R. 110, case 11978). That alone would be **res judicata** as to the issue of federal jurisdiction, for it is well settled that "The principles of **res judicata** apply to questions of jurisdiction as well as to other issues," and that "The principles of **res judicata** may apply, although the proceedings were begun **by motion**" **(American Surety Company v. Baldwin,** 287 U. S. 156, 166).

In addition, the petitioner herein, at one stage of the proceedings, sought a writ of prohibition to restrain the federal court from further proceeding with the case on the ground that federal jurisdiction did not exist (R. 65). The writ was denied by the court of appeals on June 21, 1949, and thus again the question of federal jurisdiction was adjudicated.

As has been indicated, petitioner was not a party to the original suit and was allowed to intervene only because it had purchased the interests of the two defendants who had effected removal to the federal court and had successfully resisted efforts to have the case remanded. In both its petition to intervene filed January 16, 1948 (R. 3, case 12436), and in its supplemental petition for intervention (R. 18, case 12436), the petitioner herein stated that it had acquired all of the right, title and interest of Winkel and Lasser and "herein adopts the pleadings of the said Winkel and Lasser as its pleadings." This would include, of course, the petition of Winkel and Lasser to effect removal of the case to the federal court and the successful

efforts on the part of these same defendants to avoid having the case remanded. Such removal and the denial of the order to remand all happened not only prior to the date petitioner first sought to intervene but prior to the date petitioner was even incorporated. Accordingly, having obtained an alleged assignment of the rights of Winkel and Lasser and having specifically adopted all of their pleadings in the action, petitioner must, as the court of appeals held below, "therefore stand in their shoes with respect to all phases of the litigation" (180 F. (2d) 275, 277).

In addition, the court of appeals held below as follows (180 F. (2d) 275, 277):

> "In any event, regardless of whether the issue of jurisdiction is **res judicata** under these prior adjudications, we believe the record discloses diversity and a separable controversy between the parties sufficient to sustain federal jurisdiction here."

In short, federal jurisdiction was originally invoked by the assignors of the petitioner, who had removed the case to the federal court and had successfully resisted all efforts to remand it, and in whose shoes petitioner stands; the petitioner itself sought to challenge federal jurisdiction by a writ of prohibition which was denied, and even if the question were still open, notwithstanding earlier binding adjudications as to the existence of diversity of citizenship, the record discloses complete diversity and a separable controversy between the parties.

In any event, this issue of federal jurisdiction, as the petitioner is compelled to concede in footnote 1 on page 2 of its petition, would not, in the language of the petitioner, "of itself warrant certiorari."

CONCLUSION

The petition for certiorari should be denied.
Dated: August 10, 1950.

Respectfully submitted,

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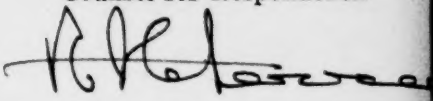

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 165.

DEAUVILLE ASSOCIATES, INC., *Petitioner,*

v.

JOHN M. MURRELL and D. H. REDFEARN, as Receivers of Deauville Corporation, *Respondents.*

REPLY BRIEF ON BEHALF OF PETITIONER IN SUPPORT OF THE PETITION FOR CERTIORARI.

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1. The court below has denied petitioner its day in court. That central fact stands, and is not in any way challenged or qualified by the digressions, technicalities and sundry appeals in the brief of respondents in opposition to the petition for certiorari.

Respondents indeed recognize the elementary injustice of the decision below when they suggest (p. 20) that this ruling will not be followed in other types of cases. Yet respondents' only distinction of this case rests on the fact that petitioner is an assignee pendente lite. Respondents argue (p. 20) that therefore petitioner could have been de-

nied intervention entirely, citing a dictum from *Mellen* v. *Moline Malleable Iron Works,* 131 U. S. 352, 371, and accordingly petitioner cannot complain of the futile intervention upheld below.

The *Mellen* dictum, if good law, would be a reason why intervention should be denied entirely. Indeed, respondents cited the *Mellen* case to the court below on the hearing of No. 12436, and again urged that precedent on a ground of a petition for rehearing of the decision in *Deauville Associates, Inc.* v. *Eristavi-Tchitcherine,* 173 F. 2d 745. The court below held, however, and quite properly (see point 2 below), that the District Court did not have discretion to refuse intervention.

The question then arises whether a court which erroneously denied an intervention can then deny intervenor the right to attack decrees entered while its erroneous denial was being reversed. That is the question presented to this Court by petitioner.

2. The court below was quite right in ignoring the ill-considered *Mellen* dictum. The decision in the *Mellen* case is the classic *lis pendens* doctrine, that a purchaser of real estate pendente litem who did not become a party to the main suit may not attack the judgment collaterally. Counsel for petitioner have found no Federal ruling which precluded the transferee from becoming a party to the main suit. Reference to the two Supreme Court cases cited in the *Mellen* case discloses that in one case the transferee did become a party to the main suit (*Union Trust Co.* v. *So. Inland Nav. & Imp. Co.,* 130 U. S. 565) and the other case noted that that assignee would have had the right to become a party (*Eyster* v. *Goff,* 91 U. S. 521, 524.)

When faced with the question directly, rather than *obiter,* this Court made provision for protection of the assignee by the District Court. *Woodman* v. *Missionary Society,* 124 U. S. 161. That such protection is properly afforded by allowing intervention was held in *Gaines* v. *Clark,* 275 Fed. 1017, decided by the Court of Appeals of the District

of Columbia. That case involved a suit to subject land to payment of notes secured by a deed of trust, and reversed the denial of intervention by a person who acquired his interest in the fee by purchase pending litigation. The court pointed out that otherwise the intervenor would be without a remedy to protect himself, and said, "we think the preponderance of modern authority is that a purchaser, or one acquiring an interest pendente lite, is entitled to intervene." 275 Fed. at 1020.

If the ruling below is to be supported on an application of the old *Mellen* dictum, the ruling involves a conflict with *Gaines* v. *Clark,* disregards a decision of this Court, and would mean a denial of a day in court warranting review by this Court as an important decision of Federal procedure.

3. Respondents say (Brief p. 11) that this petition for certiorari must fail because petitioner did not seek review of the ruling of the Circuit Court of Appeals in No. 12436, *Deauville Associates, Inc.* v. *Eristavi-Tchitcherine,* 173 F. 2d 745, see R. 146.

Far from being requisite it would have been inappropriate for petitioner to have sought review of that decision. Could petitioner have complained that it was not being granted intervention under Rule 24(a), and that it was not being granted a day in court? The opinion in question plainly said that petitioner was entitled to intervene under Rule 24(a) and that it was entitled to a day in court. (R. 146)

Nor could petitioner have insisted that the cryptic closing phrase "as of this date" meant that petitioner could not have its day in court on the merits of the intervening decree. There was certainly a possibility that the appellate decree might be so applied and petitioner filed a petition for rehearing to obtain a clarification obviating such a miscarriage of justice.

But it was more reasonable to expect that the decree would be applied to give petitioner its day in court on the

merits, in accordance with *Pyle-National Co.* v. *Amos,* 172 F. 2d 425 (C.C.A. 7th). The *Amos* case described a procedure whereby intervenor filed a *new* petition to attack the unsatisfactory judgment entered by the District Court after its erroneous denial of leave to intervene. Petitioner has likewise filed a petition attacking the intervening judgments (R. 72ff).

That the decree in No. 12436 did not require that petitioner be foreclosed from being heard on the merits is also indicated by the fact that appellees filed a petition for rehearing, protesting the ruling of the Circuit Court of Appeals and asserting that under the *Mellen* case a transferee *pendente litem* had no right to litigate its title.

If an application for certiorari had been filed in No. 12436, this Court would obviously have considered that petitioner could not cry before it was hurt, and that in view of the procedure available under the doctrine of the *Amos* case petitioner could not at that time assert a conflict with *Wolpe* v. *Poretsky,* 144 F. 2d 505 (D. C. App.).

When the Circuit Court of Appeals denied both petitions for rehearing in No. 12436, petitioner followed the proper course by proceeding in the District Court for its day in court under the procedure of the *Amos* case. The failure of both courts below to provide that day in court, as shown by this record, render appropriate the filing of the present petition for certiorari.

4. Respondents are in error in asserting that the ruling in No. 12436 was a final judgment which had to be appealed at that time. There is a fundamental difference between an order denying intervention as of right, which is appealable, and an order admitting the proposed intervenor into the case. The ruling in question manifestly did not have the characteristic of a judgment which "terminates the action" and thus must be appealed or waived. *Reeves* v. *Beardall,* 316 U. S. 283.

That the ruling referred to was not a final judgment adverse to intervenor is clearly seen from the most recent

opinion of this Court as to the elements that make up such a final judgment. *Dickinson* v. *Petroleum Conversion Corporation,* 70 Sup. Ct. 322. This Court there noted that an intervenor must appeal from, or lose the right to appeal, an order denying his absolute right to intervene, because by that ruling "the would-be intervenor is foreclosed from further action in the case and its proceedings cannot affect him nor can he affect them." (70 S. Ct. at 325.) He must likewise appeal from a judgment on the merits adverse to his separate claim. "In either case, the lawsuit is all over so far as the intervenor is concerned." (70 S. Ct. at 325.) But an order granting intervention by its very nature means that the intervenor is not foreclosed from further action in the case or that the lawsuit is all over.

Thus the decree of the court below in No. 12436 was not in the category of final judgments. Moreover, as already shown, the court's opinion, fairly read, did not even constitute a decision advising that petitioner's claim on the merits would be dismissed when duly presented, although the court below now reads its earlier ruling in that fashion.

The doctrine requiring the taking of appeals from a final judgment only applies to a ruling which constitutes a "definitive adjudication," *Missouri-Kansas Pipe Line Co.* v. *United States,* 312 U. S. 502, 506, and is inapplicable where the questions which would have to be raised are speculative ones. *Credits Commutation Co.* v. *United States,* 177 U. S. 311, 316. Only in 1950 did the court below definitively and clearly rule that petitioner was disabled from contesting decrees entered before April 4, 1949. Petitioner was not required at its appeal to seek certiorari from the 1949 decree in No. 12436.

5. Respondents further object (Br. p. 22) that the District Court orders are not final. The order directing the receivers to sell the listed property (R. 78), which is based on a rejection of petitioner's purchase claim, is properly before the Court although the particular sale then contemplated was not consummated and the property was offered

again a year later subject to the action in this case. Moreover, respondents make no reference to the fundamental judgment, striking and denying the petition to set aside the orders previously entered (R. 82), which is plainly an order on the merits and thus in the class of final judgments.

6. This case basically involves a question of intervention procedure turning upon the rulings of the courts below. The substantive litigation is primarily merely a matter of background. It would promote unnecessary discussion to explore all the side-topics discussed in respondents' brief. It suffices to call attention to a few matters mentioned by respondents:

a. Respondents' irrelevant and gratuitious reference (Br. p. 4) to the fact that Mr. Kowal was formerly called Kowalsky dramatically reveals the plane of their brief. Respondents also refer to indefinite allegations of fraud by Lasser and Winkel against their former attorneys of record. Respondents note that Samuel Rubin was one of those attorneys of record, (Br. p. 7), citing R. 215, No. 11978, but fail to mention what that record reference shows, that the primary attorneys of record representing Lasser and Winkel were Charles Danton, and Redfearn and Ferrell, Redfearn being a respondent herein and Danton and Ferrell being counsel for respondents.

b. Respondents apparently attempt to paint a picture of a dilatory intervenor who did not come into the litigation until it had been pending more than two years, who waited before filing an intervention, who failed to appeal a first denial of the intervention in May 1947, etc. (Brief, p. 6). There is absolutely no basis for asserting a lack of timely application, and neither court below so claimed. The relevant facts are outlined in Appendix A, and may be summarized as follows:

Sixteen months after the filing of the original complaint in February 1945, Mr. Kowal was brought into negotiation with the plaintiff's attorney, Mr. Murrell, for im-

plementing a settlement between the parties. That deal fell through and in August 1946 Mr. Kowal made a joint venture agreement with defendants Lasser and Winkel. Plaintiff filed an amended complaint in September 1946. Defendants filed their answer and cross-complaint in November 1946. Mr. Samuel Rubin was then acting as associate counsel for defendants. Defendants moved for judgment on the pleadings in January 1947. The District Court's opinion-order of April 24, 1947, was in favor of defendants, granting specific performance of the May 15, 1944, agreement to purchase the hotel property, conditioned, of course, upon relinquishment of all rights to stock in Deauville Corporation by defendants, the Kowals, and petitioner. (No. 11978, R. 344.)

The District Court indicated that the Kowal's interest in the real estate could appropriately be protected by intervention (No. 11978, p. 347). Petitioner's intervention application was filed on May 8, 1947. The District Court ordered that that application be withdrawn as confusing and unnecessary at that particular time, but stated it would be without prejudice to a later intervention petition. (No. 12436, p. 444). The Circuit Court of Appeals reversed the judgment on the merits in November 1947, and petitioner then filed the applications for intervention here in issue on January 16, 1948, and February 13, 1948 (R. 26, 74; see No. 12436, pp. 2, 8).

It is evident that petitioner has acted timely and has in no way delayed the litigation. The delays have ensued from the District Court's erroneous denial of the intervention application, for which petitioner can hardly be held responsible.

Conclusion.

This case presents a conflict of decisions of circuit courts of appeals, and a basic injustice denying petitioner its day

in court. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

Steps taken by Mr. Kowal and petitioner to protect intervening interest.

Respondents state that petitioner came into the proceeding when the action had been pending "over two years"; that the intervention on May 13, 1947, was denied and petitioner did not appeal, and that the next intervention petitions were not filed until January and February 1948. (Brief, p. 6)

The basic time-table may be summarized as follows: The complaint was filed February 16, 1945. The second amended complaint was filed on September 24, 1946. The defendants filed an answer and cross-complaint on November 4, 1946. Defendants moved for judgment on the pleadings on January 16, 1947. The District Judge filed opinion orders in favor of defendants on March 26 and April 24, 1947. The Circuit Court of Appeals reversed on November 7, 1947. (See Appendix to petition for certiorari.)

Isadore Kowal started negotiations for the hotel, acting on behalf of himself and his sons, in July 1946 when he met with John Murrell, attorney for plaintiff (No. 12436, p. 9), regarding acquiring the hotel property. The plaintiff and defendants had entered into a settlement agreement dated May 24, 1946 (No. 12436, p. 647), which was extended until August. Kowal made a proposal to John Murrell, as trustee, on August 6, 1946; this was eventually rejected. (No. 12436, pp. 11, 641) (See testimony of Charles Danton, pp. 126-129). Mr. Kowal entered into negotiations with Charles Danton, counsel for respondent herein, and then attorney for defendants Lasser and Winkel. Mr. Kowal executed an agreement of August 17, 1946, with Lasser and Winkel to acquire half their interest, this being a joint venture under the name "Deauville Associates" (No. 12436, p. 623, Exh. 2; p. 12). Mr. Kowal advanced $25,000—$10,000

to Lasser, $10,000 to Winkel, and $5,000 to Charles Danton, as attorney for the joint venture. (No. 12436, p. 143). Kowal did not then know (No. 12436, p. 130), but later learned that Lasser and Winkel had pledged their stock in Deauville Corporation as security for a debt; Kowal paid the debt and acquired the stock certificates (No. 12436, pp. 13-14). Subsequently petitioner was organized, on March 12, 1947, as a corporate form for the joint venture, and stock in petitioner was issued, 50% to Lasser and Winkel, and 50% to Kowal.

During the latter part of 1946, after the execution of the joint venture agreement, attorney Samuel Rubin appeared as associate counsel for Lasser and Winkel. At that time he signed, with Charles Danton and R. H. Ferrell (counsel for respondents herein), the defendants' cross-complaint of November 4, 1946 (No. 11978, p. 215). The District Court accepted him as associate counsel for defendants, in view of his connection with their interests, but this status was terminated by the District Court on May 13, 1947, when he was confined to representation of the Kowals. (No. 12436, p. 439).

The District Court on April 24, 1947, entered an opinion order granting Lasser and Winkel specific performance of their May 15, 1944, agreement.

This was based upon defendant's answer consenting to relinquishment of all rights to the stock of Deauville Corporation, and also was conditioned upon disclaimer of all rights in that stock by the Kowals, and later also by petitioner. (No. 11978, pp. 344-353). The Court stated that if the Kowals loaned moneys to the defendants in good faith on the stock as collateral, they should seek to intervene for the protection of their interest in the real estate and of their rights against Lasser and Winkel. (No. 11978, p. 347)

When petitioner presented its application to intervene of May 8, 1947, (No. 12436, p. 417), the District Court ruled that this petition should be withdrawn as possibly confusing the status of the parties, in view of pending disclaim-

ers, at that particular time. The court stated that petitioner was not required to take an affirmative step at that particular time, since nothing could be done until the future, and could intervene in the future (No. 12436, pp. 443-444).

Following the reversal by the Circuit Court of Appeals in November 1947, petitioner filed applications to intervene on January 16, 1948 and February 13, 1948 (R. 26, 74; see No. 12436, p. 218). The supplemental application alleged that although at first Lasser and Winkel held stock in petitioner corporation, they had pledged that stock to secure further advances by Kowal and now held no more stock.

The District Court denied the application on April 1, 1948, on the ground that Mr. Kowal either knew or else he was chargeable with knowledge of the fact that Lasser and Winkel had acted in violation of an injunction in transferring their stock in Deauville Corporation (No. 12436, p. 408). No reference was made to the assignment by Lasser and Winkel of their right to purchase the hotel.

Petitioner immediately sought a mandamus from the Circuit Court of Appeals, but on April 16, 1948, that court denied mandamus and held it would review the matter upon appeal. (R. 138, 148). The appeal was not heard and decided until April 4, 1949 (R. 146-148).

MOTION FILED OCT 31 1950

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 165.

DEAUVILLE ASSOCIATES, INC., *Petitioner,*

v.

MURRELL, ET AL., *Respondents.*

MOTION FOR LEAVE TO FILE AND PETITION FOR REHEARING ON APPLICATION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 165.

DEAUVILLE ASSOCIATES, INC., *Petitioner*,

v.

MURRELL, ET AL., *Respondents*.

MOTION FOR LEAVE TO FILE AND PETITION FOR REHEARING ON APPLICATION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Motion for Leave to File.

The petition for rehearing, set forth below, was not filed within the time limitations of Rule 33 because of the absence in Europe on urgent business of Washington counsel for Petitioner and because of unforeseeable transportation difficulties which prevented his timely return. For these reasons, and because this case (No. 165) and the Lojoy case (No. 383) are related, it is respectfully requested that the motion for leave to file be granted; if the Court grants the petition in the Lojoy case (Filed October 25, 1950) it will wish to reconsider its position in this case.

Petition for Rehearing on Application for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

The petition for certiorari presented the fundamental question whether petitioner had been denied its day in court when the lower court refused to permit petitioner-intervenor to present objections to any decrees entered after the date of its application to intervene, and even after the date of the district court's erroneous denial of the intervention application, but before the circuit court of appeals reversed the error and granted the application to intervene.

If petitioner is not to be given its day in court—as to decrees entered between January 1948 and April 4, 1949—as an intervenor, then it must be permitted to ignore any such decrees and must have full freedom to question them on the merits in other proceedings without being bound by its status in this proceeding. The lower court has denied petitioner that avenue in court, and review of that ruling is sought in *Deauville Associates, Inc.* v. *Lojoy*, No. 383, petition filed October 25, 1950.

Petitioner suggests that the action in No. 165 be reconsidered and that this case be reviewed at the same time as the Lojoy case (No. 383). This Court can thus consider at one time the two avenues sought by petitioner for its day in court, and determine which provides a more orderly administration of justice.

It is respectfully submitted that this petition for rehearing should be granted and that the petition for a writ of certiorari should be granted.

Certificate of Counsel.

It is hereby certified that the above petition for rehearing is presented in good faith and not filed for the purpose of delay. The critical new fact is that the petition in the Lojoy case (No. 383), recently filed, was not before the Court at the time that the petition in this case was under initial consideration.

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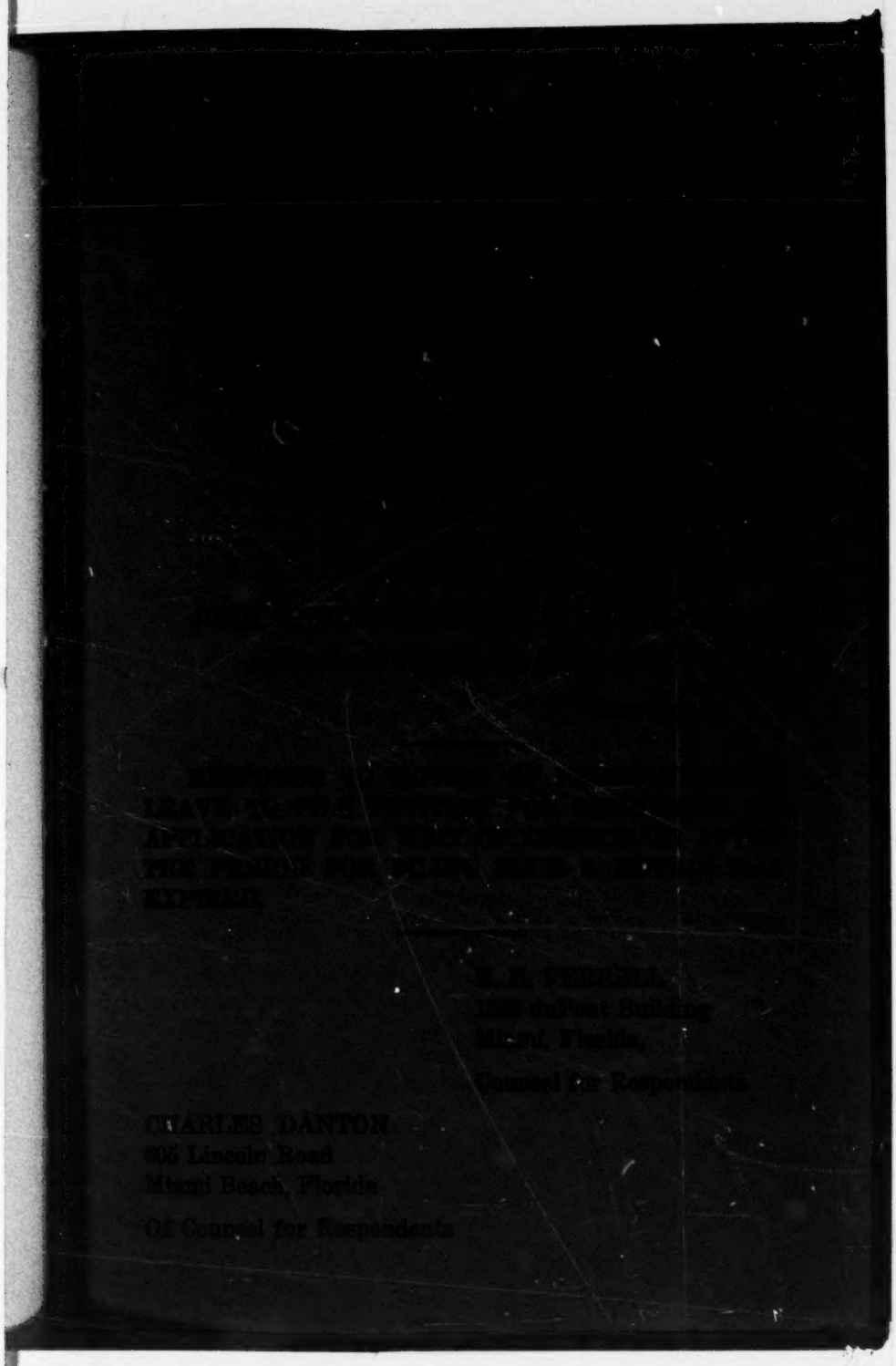

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1950

No. 165

DEAUVILLE ASSOCIATES, INC.,

Petitioner,

vs.

JOHN M. MURRELL and D. H. REDFEARN,
as Receivers of Deauville Corporation,

Respondents.

RESPONSE TO MOTION OF PETITIONER FOR LEAVE TO FILE PETITION FOR REHEARING ON APPLICATION FOR WRIT OF CERTIORARI AFTER THE PERIOD FOR FILING SUCH A MOTION HAS EXPIRED.

Petitioner has filed its motion for permission to file a petition for a rehearing on the order denying its application for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit. The motion was filed subsequent to the 15 day period provided for in rule

33 of this court in which a petition for rehearing may be filed with the clerk. The reason advanced in the motion for such extra-ordinary relief was "the absence in Europe on urgent business of Washington counsel for Petitioner and because of unforeseeable transportation difficulties which prevented his timely return".

REASONS WHY SAID MOTION SHOULD NOT BE GRANTED

1.

Said motion shows that it is filed by Ginsburg and Leventhal by David Ginsburg of 914 Ring Building, Washington 6, D. C. The original petition for writ of certiorari was signed by Harold Leventhal, of the same address, and by Samuel J. Kanner, of Miami, Florida, and Samuel H. Rubin, of Detroit, Michigan.

The motion does not reveal which one of the Washington counsel was absent in Europe on urgent business and detained there by unforeseeable transportation difficulties. It is to be assumed that the Washington counsel referred to was Harold Leventhal, inasmuch as the motion above referred to is signed by Ginsburg and Leventhal, by David Ginsburg. The result is that David Ginsburg, the partner of Harold Leventhal, was in Washington and not in Europe at the time of the running of the period in which a petition for rehearing could have been filed. Therefore, the ground for the motion fails.

The motion is also without merit, because Samuel J. Kanner, of 213 Shoreland Building, Miami, Florida, was one of the attorneys for the petitioner and was available

and in the jurisdiction of the court during the period in which a petition for rehearing could have been filed. The same is true of Samuel H. Rubin, of 2315 Cadillac Tower, Detroit, Michigan, one of the attorneys for petitioner.

2.

The time for filing a petition for rehearing must end at some time and that time is determined by rule 33 of this court and limited to 15 days after the judgment or decision of the court. That 15 day period had expired prior to the filing of the above motion. Because of this fact the following statement from the case of MABSON v. CHRIST, 96 Fla. 756, 119 So. 131, 132 is applicable:

> "It has been well said that there must be some point in every court proceeding when the cause is finally disposed of, its thread cut, and the parties out of court, unless brought in again by some new process served upon them. The public welfare demands that there shall be some definite end to litigation — a point sometime, somewhere, when every case is terminated. We cannot afford to return to the interminable and outrageous practice similar to that depicted in Dickens' case of Jarndyce v. Jarndyce. Especially is this true where, as with us, a court of equity has no stated terms, but is regarded as always open. This point of finality is reached with us, under both the statute and rule 45, 20 days after final decree, when the final decree is based upon decree pro confesso, and, under the statute and rule 90, when the time for rehearing has expired, as to decrees in general."

3.

This point of finality was reached in the present case at the expiration of the 15 days provided for under rule 33 of this court, and this court then lost jurisdiction of this case.

R. SIMPSON & CO. INC., Petitioner v. COMMISSIONER OF INTERNAL REVENUE, 321 U. S. 225, 230, 88 L. ed. 688.

For these reasons respondents respectfully request the court to deny said motion.

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